IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 1097 OF 1983

ALLAHABAD BANK ..PLAINTIFFS

V/S

REWACHAND LADHARAM RAMACHANDANI

& ANR. ..DEFENDANTS

RAJESH KOTHARI WITH AVINASH JOSHI I/B MULLA & MULLA FOR PLAINTIFFS.

P.K. DHAKHEPALKAR, SR. ADVOCATE WITH K.A. SHROFF I/B DHRU & CO. FOR DEFENDANT NO.1.

CORAM: S.K.SHAH,J.

JUDGMENT RESERVED ON 21-11-2006

JUDGMENT PRONOUNCED ON 30-11-2006

JUDGMENT

1. The suit is for declaration that defendant No.1 had agreed to sell the suit flat and for specific

performance of the said agreement.

2. The suit flat is flat No. 12/A in 'B' Building on the first floor of Cozihome at Pali Hill Road, Bandra.

3. The suit agreement is dated 1st August, 1978. The agreement was entered into between the original plaintiff United Industrial Bank Ltd. and the defendant No.1. The agreement was leave and licence for a period of 3 years. During the pendency of the suit the original plaintiff United Industrial Bank was amalgamated with Allahabad Bank constitued under the Banking Companies (Acquisition and Transfer of Undertakings) Act V of 1970. As a result of the acquisition the United Industrial Bank was replaced by Allahabad Bank. The monthly licence fees was Rs. 1400/-.

4. The agreement included clause 21 which runs as under :

. 21. The Licensee assures and agrees with the Licensor that it will vacate the said flat on the

expiry of thelicence period and in the event of not vacating the said flat the Licensee will be bound to

buy over the said flat for Rs. 2,00,000/- (Rupees two lakhs) being the purchase price in respect of the said flat. In that event the licensee will pay to G.G. Mirchandani brokerage of Rs. 4,000/- at the rate of 2% of the purchase price.

5. The agreement also included clause 22 which runs as under:

. 22. The aforesaid licence will be renewable for a further period of three years at the option of the Licensee provided the terms and conditions of the fresh licence is mutually agreed upon between the Licensor and the Licensee failing which the Licensee would vacate the flat or buy over the flat as stated in clause 21 above.

6. The original plaintiff was put in possession of the suit premises immediately after the agreement was executed, that is, on 1st August, 1978 and the present plaintiffs have been in possession thereof till today.

7. In the meantime there was proceeding in the Co-operative Court, Bombay, for recovery of the dues

of the Co-operative Society of the flat owners residing in the building against the defendant No. 1.

8. The period of leave and licence for 3 years was to expire on 31st July, 1981. Before that date the plaintiffs gave notice dated 26th June 1981 to the original plaintiff intimating that the original plaintiffs were exercising the option to buy over the said suit flat at the price mentioned in the agreement. The plaintiffs allege that the defendant No. 1 however did not reply nor did he comply the said agreement to sell the flat to the original plaintiffs. The original plaintiffs neither vacated the suit flat nor renewed the leave and licence agreement. In the meantime on 17th December, 1981 the original plaintiffs wrote to defendant No. 2 society to intimate to them the society's dues that were payable by the defendant No. 1. The defendant No. 2 by their letter dated 23/12/1981 intimated the arrears of society's dues and those dues were

paid by the plaintiffs.

9. The plaintiffs thus allege that they are ready and willing to comply with the agreement dated 1st

August 1978 and to buy the suit flat and to become the member of defendant No. 2 society. However, the defendant No. 1 did not act as agreed and therefore the plaintiffs filed the suit for declaration and for specific performance of the agreement.

10. The defendant No. 1 resisted the suit by written statement filed on 13th August, 2001. He contends that there is no privity of contract between the present plaintiffs and him. The licence granted was to original plaintiffs and it was not capable of being assigned.

11. Without prejudice to these contentions he contends that the suit is filed on a complete mis-interpretation of the terms of the said leave and licence agreement with a view to take advantage of their own wrong. He further contends that on their own showing the plaintiff is a licensee of the

suit premises and as such the exclusive jurisdiction vested in the Court of Small Causes, Mumbai. He further contends that the leave and licence agreement was for a period of 3 years. The clause 21 of the agreement does not and was never intended

to give the original plaintiffs any right or option to purchase the said flat. The clause 21 was introduced for the protection of the defendant, in as much as in the event of the original plaintiffs not vacating the said premises on the expiry of the licence period the defendant would have the right to exercise option to compel the plaintiffs to buy over the said flat for Rs. 2 lacs. This clause No. 21 was never intended and it does not give the benefit to the original plaintiffs for committing the wrong of not handing over or vacating the said flat and exercise the option of buying over the said flat. He contends that the original plaintiff was put in possession of the suit flat on the express assurance that the original plaintiff would vacate the said flat on the expiry of leave and licence. He further contends, that clause 21 is a option to the original plaintiff to purchase without admitting right of the original plaintiff, that gives a option to the original plaintiff to purchase the said flat which

could have been exercised only on the happening of the event namely the original plaintiffs not vacating the said flat on the expiry of the period oflicence, that is, on 31st July 1981. Clause 21 cast a burden on the original plaintiffs to purchase

the said flat at the fixed price in the event of not vacating the said flat on the expiry of the licence period, if so desired by the defendant. Clause 21 nowhere binds the defendant No.1 to sell the said flat. He further contends that the notice dated 26th June, 1981 was never received by them. As such he claims dismissal of the suit.

11. The defendant No. 2 has not filed any written statement.

12. In view of these pleadings the following issues are framed against which I have recordedmy findings for the reasons given below :

ISSUES	FINDINGS
1) Whether this Hon'ble Court has no jurisdiction to try the suit as alleged in paragraph 5 of the written statement?	In the negative.

2)	Whether the terms of Leave and License agreement dated 1st August, 1978 do not enure for the benefit of the plaintiff as alleged in paragraph 2 of the written statement?	In the negative
3)	Whether the plaintiffs had option to buy over the suit flat in accordance with leave and licence agreement?	In the negative

4)	If the answer to Issue No. 3 is in the affirmative, whether the option exercised by the plaintiffs to buy over the suit flat is wrongful, illegal, void and not in accordance with the said leave and licence agreement as alleged in paragraph 4 and 6(viii) of the written statement?	Does not arise.
5)	Do the 1st defendant prove that the plaintiffs were put in possession of the suit flat on the express assurance to vacate the flat as alleged in paragraph 6(iv) of the written statement?	In the affirmative
6)	Whether the plaintiffs were ready and willing to comply with the said agreement dated 1st August, 1978?	Does not arise.
7)	What decree? What order?	As per final order.

REASONS

ISSUE NO.1

13. The contention of the defendants in this regard is that it is a matter between the licensor and

licensee and the suit is based on the leave and licence agreement and therefore this court has no jurisdiction, as the jurisdiction would lie with the Court of Small Causes, Mumbai. However, the matter of jurisdiction is decided on the contentions raised in the plaint and the prayers made in the plaint. The prayers in the plaint show that there is a prayer for declaration that the Defendant No. 1

had agreed to sell the suit flat to the original plaintiff and for specific performance of the said agreement. These prayers are based on the averments of clause 21 and 22 of the agreement. Therefore, the court is called upon to decide whether there was really any agreement for sale of the suit flat and whether specific performance of the said agreement would be granted in favour of the plaintiffs. Therefore, this suit will not fall within the purview of the provisions of section 28 of the Bombay Rent Act and therefore, this court will have jurisdiction. Therefore, this issue will have to be answered in the negative.

ISSUE NO. 2

14. The suit agreement was executed between the

original plaintiffs namely United Industrial Bank and the defendant No.1. Therefore, it is the contention of the defendant that the leave and licence agreement does not enure for the benefit of the plaintiff. However, it is a matter of fact that original plaintiffs United Industrial Bank Ltd. was amalgamated with Allahabad Bank under the provisions of Banking Companies (Acquisition and Transfer of Undertakings) Act V of 1970. Moreover, by virtue of

the suit agreement the term Licensor includes heirs, executors, administrators and assignees and the successors in business and assignees are included in the terms Licensee used in the agreement. This being so by virtue of amalgamation all the rights under the agreement available to United Industrial Bank have been merged with Allahabad Bank and Allahabad Bank being the successors of United Industrial Bank Ltd. and, thus would be entitled to have right under the agreement. As such this issue will have to be answered in the negative.

ISSUE NOS. 3, 4 & 5.

15. The contention made by the learned counsel on behalf of the plaintiffs was that as per clause 17

and 19 of the suit agreement the defendant was entitled to enter upon the suit flat and re-possess the same but that was not done. He further contends that this inaction on the part of the defendant supports the plaintiff's case that the defendant was aware of the fact of clause 21 and 22 about the sale of flat to the plaintiffs. He contends that clause 21 and 22 of the said agreement, read together, make compulsory for the plaintiff to purchase the suit flat, at the stipulated price of Rs. 2 lacs upon

their failure to arrive at the fresh terms of the licence. His contention is that these clauses neither require the defendant to call upon the plaintiff to do so nor does they require the plaintiff to exercise the option, in the event of the plaintiff not vacating the suit flat. It was automatic that the plaintiffs should purchase the suit flat at Rs. 2 lacs. There was no question of exercise of any option either by the defendant or by the plaintiff. He contends that the price of the flat was fixed. The brokerage was also fixed and even the broker is named in the suit agreement. Therefore, there is clear indication of the fact that the purchase of the flat by the plaintiff was a matter of course. He further submits that clauses

21 and 22 contemplate two eventualities namely either the plaintiff has to vacate the flat or to buy over the same and for these eventualities no formalities like giving any notice or exercising option calling upon either party, that is, the defendant to do something was required.

16. As against this, learned counsel for the defendant submitted that the several clauses of the agreement clearly indicated that the original plaintiff was put in possession of the suit flat on

the assurance that they will vacate the suit flat on completion of the period of leave and licence. He further submits that clauses 21 and 22 were for the benefit of defendant and not for the benefit of the plaintiffs. He contends that the eventuality of plaintiff purchasing the flat was last to come. Before that, under the agreement the plaintiff was required to vacate the suit flat or get renewed the leave and licence on fresh terms and conditions. If that was not done, he submits, then the plaintiff was bound to purchase and that was so only at the option of the defendants. He submits,in other words, the plaintiff could have purchased the suit flat only if the defendant was willing to sell not otherwise. Essentially the plaintiff, under the

agreement, was bound to vacate the flat on completion of the leave and licence period of 3 years. He further submits that nowhere in the agreement it is agreed by the defendants to sell the flat. For any agreement for sale the parties must mutually agree to sell and buy. He clarifies that the plaintiff could buy the suit flat only when the defendant would agree to sell and such an agreement to sell is not incorporated in the agreement. Therefore in his submission clause binding the plaintiff to purchase the suit flat was mainly to ensure that the

plaintiff would vacate the suit flat. At any rate in his submission, there being no agreement by the defendant to sell the suit flat to the plaintiff it cannot be said to be an agreement for sale of suit flat, entered into between the original plaintiff and the defendant No.1.

17. It is needless to say that whether there is any right created in favour of the plaintiff as alleged by the plaintiff it is to be borne out by the terms of the agreement. Therefore, essentially we will have to look to the terms of the agreement. Having done so, as the agreement has been termed, it is the

agreement between the licensor and licensee. All throughout the agreement the defendant No. 1 is addressed as a licensor and the original plaintiff is addressed as a licensee. There is also clear averment in the agreement that the licensor had agreed for giving the suit flat to the licensee on "leave and licence" for a period of 3 years in consideration of monthly licence fees of Rs. 1400/- to be payable by the licensee. Clause No. 1 avers that in consideration of the licence fee, the licensor granted the licence in favour of the licensee for use and occupation of the suit flat for the stipulated period of 3 years, fixing the licence

fee of Rs. 1400/-. Clause 2 sets out that the licence is granted on the following terms, namely, not to make or permit to be made any permanent alterations or additions etc.; to observe and perform all the conditions and covenants entered into between the parties; not to do or omit to do any act which would render the membership of the licensor liable to forfeiture etc.; to indemnify and to keep indemnified the licensor against any loss or damage suffered by him by reason of any act done by the licensee. Clause 6 sets out that during the term of the licence the licensor shall deposit with

the licensor Rs. 8400/- which would be payable on expiry of the licence. Clause 7 determines the licence fee. Clause 8 stipulated that the licensor shall pay the electricity and water charges, etc. Clause 9 binds the licensor to pay all the taxes, charges and outgoings and/or maintainance charges payable in respect of the suit flat. Then the material clause is clause No. 16 which sets out that the licensee shall on the expiry of the licence period or sooner determination thereof by the licensor or yield up and deliver back the licensed premises to the licensor in the same condition in which they are delivered to the licensor together

with all the furniture, fixtures and fittings. This clause therefore binds the licensee to deliver the possession of the suit flat alongwith furniture, fixture and fittings in the same condition to the licensor on expiry of the licence period.

18. So far clause No. 17 is concerned it empowers the licensor to enter upon the licensed premises and to re-possess the same in the event of any amount of compensation or licence fee remains unpaid for the space of two months or if there shall be any breach

or non-observance of any of the obligations cast on the licensee. Clause No. 19 authorise the licensor to remove the licensee and recover back the premises in the event of licensee remains in arrears of licence fee. It is after these material terms the relevant clauses namely clause No. 21 and 22 are set out in the agreement.

19. Both these clauses which are already reproduced above. The careful reading of clause No. 21 would show that in the opening words, it is mentioned that the licensee assures and agrees with the licensor that it will vacate the said flat on the expiry of licence period. These are the clear and explicit words of

clause No. 21. These words unequivocally sets out the assurance that the licensee would vacate the suit flat on the expiry of the licence period. The further wordings of clause mentions as to what would happen in the event the licensor not vacating the said flat. The clause mentions that in that event the licensee would be bound to buy over the said flat for Rs. 2 lacs being the purchase price and further mentions that in the event of such buy over the licensee would pay to G.G. Mirchandani

brokerage of Rs. 4000/- at the rate of 2% of the purchase price. Then comes clause No. 22 which mentions about the renewal of the leave and licence for further period of 3 years at the option of licensee provided the terms and conditions of the fresh licence is mutually agreed upon between the licensor and licensee. The clause further mentions that such renewal of mutually agreed terms and conditions does not take place the first thing to happen, as provided in this clause is that the licensee would vacate the flat or buy over the flat as stated in clause 21 above.

20. Thus the reading of the clauses incorporated in the terms and conditions would make it clear that the leave and licence agreement was entered into and

the original plaintiff was put in possession of the suit flat on those terms and conditions which specifically mentions that on expiry of the period of licence the licensee i.e. the original plaintiff would vacate the flat, unless the leave and licence granted is renewed on fresh terms and conditions agreed upon between the parties. If any of these things does not happen it is then that the plaintiff was bound to buy over the flat for consideration of

Rs. 2 lacs. It is, therefore, obvious that in the first instance the original plaintiff would have to vacate the suit flat on the expiry of the period of licence or atleast to renew the period of leave and licence on fresh terms and conditions agreed upon between the parties. It is undisputed that nothing of this sort had happened. What had happened in fact was that before the leave and licence period of 3 years which expired on 31st July, 1981, the original plaintiff gave notice dated 26th June, 1981. It is pertinent to note the contents of this notice. The said notice is at Ex. P-7. The notice mentions that clause 21 of the agreement provides that on the expiry of the period of agreement the original plaintiffs were entitled to buy over the flat for Rs. 2 lacs and that the period of

agreement was expiring on 31st July, 1981. The notice further mentions that the plaintiff would exercise their right given in clause 21 to buy over the flat for the said sum. It also mentions that the original plaintiff will send the cheque for Rs. 2 lacs on confirmation from the defendant No.1. Thus the plainmtiff had unilaterally exercised the option to buy over the suit flat even before the expiry of the licence period, obviously without

making any efforts to get the period of licence renewed on fresh terms and conditions or even without offering to vacate the suit flat. Basically the plaintiffs have failed to prove that notice dated 26th June, 1981 Ex.P-7 was served on the defendant. Such unilateral exercise of the option was obviously not available. The plaintiff although was bound to buy over the flat that could not have been without the offer being made by the defendant. From the various clauses of the agreement it is clear that the defendant i.e. licensor had nowhere bound himself to sell the flat. Though the licensee was bound by the agreement to purchase the flat that could not have been done by the licensee i.e. the plaintiff unilaterally without any offer being made to that effect. The reading of all the clauses of the leave and licence agreement together would indicate that the said

clause binding the original plaintiff, the licensee, to buy over the suit flat was obviously for the benefit of the defendant. In the event that there was no renewal of the leave and licence agreement or where the licensee does not vacate the suit flat and if it appears to the licensor - defendant that there is no use in going into the litigation he could decide to sell the suit

flat and thereupon offer the same to the licensee.

21. If there is agreement to sell it is obvious that one party should agree to sell and another party should agree to purchase. It is only in that event it becomes an agreement for sale. In the said agreement for leave and licence although the original plaintiff namely the licensee was bound over to buy the suit flat, the defendant - licensor had never agreed to sell under the agreement. Therefore the agreement binding the licensee to purchase the suit flat could have been exercised by the original plaintiff only when the defendant would have offered to sell and not otherwise. I am not impressed with the argument advanced on behalf of the plaintiffs that for buying over the suit flat there is no such wording used in the agreement nor

interpretation of the terms and conditions of the agreement would lead to such an inference. On the contrary the tenor of the notice dated 26th June, 1981 Ex. P-7 itself indicates that the original plaintiff had expected the defendant to make the offer to sell the flat, so that the original plaintiff could send consideration for Rs. 2 lacs. This itself demolishes the theory of automatic

purchase of the suit flat as advanced on behalf of the plaintiff. As already discussed above the various clauses of the agreement indicated that the possession of the suit flat was given to the original plaintiff on the clear understanding that the original plaintiff would vacate the flat on expiry of the period of leave and licence.

22. It was further submitted on behalf of the plaintiff that in view of the provisions of section 74 of the Contract Act the condition of the licensee buying over the flat was by way of punishment and therefore the court should decide on the quantum of punishment. However, this submission is not palatable. In fact there was no contract entered into between the parties with regard to the sale of the suit flat. The agreement nowhere indicates that

the defendant No. 1 agreed to sell although there is a clause binding the original plaintiff to purchase it in certain eventualities.

23. It was also vehemently submitted on behalf of the plaintiff that the contention of the defendant was such that he knew that he was bound to sell the suit flat to the original plaintiff under the agreement. It was pointed out that since after the

expiry of the licence period of 3 years the defendant has not taken any steps to get the suit flat vacated by the plaintiff. He further pointed out that the suit was filed in 1983 and till today the plaintiff has not filed any eviction suit in the Court of Small Causes at Bombay. However this submission does not have any merit. It is quite probable that since this suit was pending the defendant may not have preferred to file the suit for eviction, probably waiting for the result of this suit. At any rate merely because the defendant could not file any suit for eviction that does not mean that he had agreed to sell the suit flat to the plaintiff. It was also submitted on behalf of the plaintiff that clause 6 require the defendant to return the security deposit. However that is also not done. However, this security deposit was to be returned only on the plaintiff vacating the suit premises and not otherwise and therefore there was

no question of returning the security deposit of Rs. 8400/-. He also pointed out Explanation 1 of sub section 2 of section 20 of the Specific Relief Act that "Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to

constitute an unfair advantage within the meaning of clause (a)." However, basically there was no agreement for sale of the suit flat entered into between the plaintiff and the defendant.

24. Under these circumstances the issue No. 3 will have to be answered in the negative. Consequently the issue No. 4 will have to be answered as does not arise and it will have to be answered accordingly. Even otherwise if that option was available that was wrongly and illegally exercised by the plaintiff before the expiry of the period of licence and without offering to vacate the suit premises or even getting the licence renewed. However, I answer that issue as does not arise. Issue No. 5 shall have to be answered in the affirmative.

Issue No. 6 :

25. This issue does not arise as there was no agreement to sell of the suit flat to the plaintiff

at all. However with a view to decide the suit in its entirity I would consider this aspect also. Besides mere averments made in the plaint to the effect that the plaintiff was ready and willing to perform their part of the contract nothing has been

done by the plaintiff towards that end. The plaintiff has neither deposited the amount of Rs. 2 lacs nor offered the amount to the defendant.

24. Learned counsel for the plaintiff vehemently submits that the plaintiff has shown readiness and willingness to perform the plaintiff's part of the contract could be seen from the very fact that amount of Rs. 39,964.60 being the liability of the defendant to pay their charges was paid by the plaintiff. He therefore submit that this was towards the readiness and willingness to perform the plaintiff's part of the agreement. However, I do not find any merit in this submission. Since the plaintiffs were occupying the suit flat, in order to avoid action against them being the occupants, initiated by the society, they had paid the amount. That cannot be the amount towards the payment of agreed consideration. Therefore, if at all I have to answer this issue I would have answered it in the negative. But as there was no agreement of sale I answer this issue as does not arise.

25. Consequently the plaintiffs are not entitled to declaration as prayed for or a decree for specific performance as prayed for. The suit is liable to be

dismissed. Hence the order :

ORDER

The Suit is dismissed with costs.

(S.K. SHAH, J.)